

Adopt Chapter Ins 4300, to read as follows:

CHAPTER Ins 4300 FIDUCIARY OBLIGATION OF PRODUCERS

Statutory Authority: RSA 400-A:15, I.; RSA 402-J:18

Ins 4301.01 Purpose and Scope.

(a) The purpose of this part is to provide standards and requirements regarding the fiduciary obligation of insurance producers.

(b) This part shall apply to all resident and non-resident insurance producers licensed pursuant to RSA 402-J.

Ins 4301.02 Definitions.

(a) "Commissioner" means the insurance commissioner.

(b) "Producer" means a resident or non-resident producer pursuant to the provisions of RSA 402-J.

Ins 4301.03 Fiduciary Obligation.

(a) Insurance producers hold premiums and return premiums as a trustee, and not as the owner of the beneficial title to the funds.

(b) Any money, or thing of value received by a producer as premium or return premium on or under any policy of insurance or application therefor, shall be received by the producer in a fiduciary capacity.

(c) Any producer who appropriates to his/her own use, or, with intent to appropriate to his/her own use, takes, secretes, withholds, lends, invests or otherwise disposes of, uses or applies any such premium or return premium received by him/her, contrary to the instructions or without the consent of the insurer for or on account of which the same was received by him/her, shall be deemed to have violated this part, irrespective of whether he/she has or claims to have any commission or other interest in such premium or return premium.

(d) Premiums and return premiums shall be received by an insurance producer in the producer's fiduciary capacity and the diversion of premiums or return premiums to the insurance producer's personal use shall violate the provisions of Ins 4301.04.

(e) Insurance producers shall treat all premiums and return premiums as trust funds and segregate them from their own funds.

(f) The insurance producer shall keep an accurate record of all fiduciary funds in accordance with Ins 4301.08. The insurance producer's financial statement shall clearly show those funds that are held in trust accounts for the benefit of insurers and that the liability section of the producer's statement shall reflect the balances due companies from such trust accounts. An insurance producer shall not use fiduciary funds as collateral for a personal or business loan or treat insurance premiums or return premiums as personal assets.

(g) In order to meet fiduciary obligations, an insurance producer shall set up a premium trust account pursuant to Ins 4301.04 in a bank or financial institution and maintain all fiduciary funds in such bank or financial institution until actually remitted to the insurer or person entitled thereto. The remittance of premiums shall be governed by the terms of the individual contracts or agreements between the producer and insurer.

Ins 4301.04 Establishment of Premium Trust Account.

(a) Each insurance producer shall establish a premium trust account if the insurance producer expects to receive premiums or return premiums on New Hampshire business.

(b) An insurance producer shall only utilize such accounts that require no advance notice for the withdrawal of funds, and all insurance producers shall arrange all such accounts so that the funds therein contained shall be immediately available during normal business hours.

(c) Fiduciary funds on New Hampshire business shall at all times be maintained in the premium trust account separate from any other account or depository. Such account shall be in an amount at least equal to the premiums and return premiums, net of commissions, received by him and unpaid to the persons entitled thereto, or, at their direction or pursuant to written contract, for the account of such persons.

(d) The balance in the premium trust account, plus premiums due from insureds less an amount equal to 110 percent of the average bad debts figured over the preceding 3 years, shall at all times be equal to or exceed the balance due the insurers.

(e) The insurance producer's New Hampshire premium trust account signature card shall contain the following notation:

"This is an insurance premium trust account maintained under the provisions of Chapter Ins 4300."

(f) Checks drawn on the premium trust account shall bear the notation "Premium Trust Account."

Ins 4301.05 Commingling of Funds Prohibited.

(a) Under no circumstances shall an insurance producer place fiduciary funds in a personal or business operating account. The insurance producer may retain commission income or other funds in the premium trust account in order to advance premiums, establish reserves for paying return commissions or for such contingencies as may arise in the producer's business of receiving and transmitting premiums or return premium funds.

(b) Insurance producers may retain a portion of their unearned commissions in the premium trust account in order to avoid being short in the event of a policy cancellation. When a policy is cancelled and the return premium is received by the insurance producer by means of a credit or otherwise, those funds shall be placed in the premium trust account until remitted to the insured entitled thereto.

(c) Cash premium payments shall not be deposited into the insurance producer's personal account in order to draw a personal check in the amount of net premium payment to the insurer. The use of personal checks to transmit fiduciary funds shall be prohibited in any situation as it results in commingling the fiduciary funds with the producer's personal funds.

Ins 4301.06 Return Premiums. The insurance producer shall hold the return premiums as a fiduciary. The producer shall retain the return premium in the trust account until remittance to the client is made which is to occur no later than 45 days from the date the return premium is determined. If the return premium cannot be delivered to the insured entitled thereto, the funds shall be returned to the insurer. The insurer shall report the funds escheated to the state of New Hampshire, in accordance with applicable statutes.

Ins 4301.07 Exchange Terms. Transactions that are handled simply as exchange items, such as New Hampshire automobile reinsurance facility business and direct mail downpayments, shall flow through the premium trust account.

Ins 4301.08 Recordkeeping Requirements.

(a) The following records relative to the premium trust account shall be maintained at all times by the insurance producer:

(1) Periodic statements of account supplied by the bank for all premium trust accounts maintained pursuant to this part;

(2) Records of all deposits made into each premium trust account;

(3) Cancelled checks drawn on, or records of withdrawal of funds from, such premium trust accounts; and

(4) An accounts receivable listing or similar record.

(b) All records described above shall be kept in the principal office in this state of the insurance producer.

(c) All records shall be maintained in an orderly manner so that the information therein is readily available and shall be open to inspection or examination by the commissioner at all times.

Ins 4301.09 Penalty.

(a) Any insurance producer who shall knowingly violate any provision of this part shall after hearing be subject to the provisions of RSA 400-A:15, III.

(b) In addition to (a) above, violations involving possible criminal acts shall be referred to the office of the attorney general or to the county attorney for investigation and prosecution.

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